Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1543

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MRS. CARNELL RUSS, VERNA RUSS, ROOSEVELT RUSS, ANGELA RUSS, CURTIS RUSS, SYLVIA RUSS, ANTHONY RUSS, PATRICIA RUSS, minors, by their mother and next friend Mrs. Carnell Russ,

Petitioners,

—vs—

BENJAMIN R. CIVILETTI, Attorney General of the United States, WILLIAM WEBSTER, Director of the Federal Bureau of Investigation, JOHN T. KELLY, Special Agent in Charge, Little Rock, Arkansas, Raymond Faist, formerly Special Agent in Charge, Little Rock, Arkansas, and others (unknown),

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION (PURSUANT TO RULE 24(5) OF THIS COURT)

THOMAS I. ATKINS
CHARLES E. CARTER
JAMES I. MEYERSON
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100

J. FRANCIS POHLHAUS
733 15th Street, N.W.
Suite #410
Washington, D.C. 20005
(202) 638-2269

Attorneys for Petitioners

June 9, 1980

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VS.

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In reply to the Brief of the Respondents in Opposition, the Petitioners, pursuant to Rule 24(5) of this Court, submit:

1. Notwithstanding that just recently the United States Court of Appeals for the Seventh Circuit modified its previously enunciated decision in *Hampton* v. *Hanrahan,* 600 F. 2d 600 (7th Cir. 1979) (as supplemented, —— F.2d —— (December 12, 1979), See: Appendix K to the Petition herein) and deleted therefrom reference to the "official capacity" of the federal defendants in so far as apportionment of the attorneys fees award was concerned (—— F.2d —— (April 15, 1979), see: Order, appended herein), some ambiguity exists in the order to leave open the effect, if any, of the decision on the instant case (in light of the issue

raised herein* and the conflict of the supplemental *Hampton* pronouncement with the decision of the majority of the panel below). Since this Court recently set aside the attorneys fees award, in toto, based on the absence of a "prevailing party status" to the successful *Hampton* Plaintiffs-Appellants, See: 48 U.S.L.W. 3780 (June 2, 1980), one could assume that the previously articulated conflict, referred to in the Petition (between the decision of the majority of the panel below and the Seventh Circuit), has been substantially undercut if not totally negated.

Nevertheless, notwithstanding the potential mooting of the conflict, in theory (since the Seventh Circuit decision was vacated), it is apparent that the conflict still retains a reality since the vacation was on a ground other than that focused upon herein, as a basis for the conflict, and since it is likely that the Seventh Circuit will continue to hold federal Defendants in their individual capacities responsible for attorneys fees to prevailing private civil rights litigants. Accordingly, a conflict does continue to exist between the majority of the panel below and the Seventh Circuit.

Furthermore, there still remains substantial reason, otherwise, for this Court to grant the requested review (as more fully discussed in the Petition).

2. Recently it was noted:

> "In the last half-century, numerous commentators have pointed out the injustice of continuing unneeded protection for the government at a cost of depriving individuals of remedies that would have been available against private defendants. These scholars have urged that the immunity doctrine be abandoned or, at the very least, that statutes seeming to contemplate a waiver of sovereign immunity without doing so in express terms be interpreted liberally." (Footnotes omitted).

See: Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Columbia Law Review 346, 364 (March, 1980). Commenting further and citing to the instant case as well as *Shannon* v. *United States Department of Housing and Urban Development*, 577 F.2d 854 (3d Cir. 1978), *cert. denied* 439 U.S. 1002, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978) (to which the Respondents cite in support of their position that review herein be denied), the author wrote:

> "... it is surprising that recent cases, including *NAACP* v. *Civiletti*, have held the United States immune from claims under the Awards Act. While the Awards Act does not waive immunity in the specific language used in previous civil rights statutes, the wording, which provides a bar to government recovery as a prevailing party, makes no sense unless it is assumed that Congress envisioned the section to apply to litigation against the government." (Footnotes omitted). *Id.*

Continuing, the commentator wrote:

> "Furthermore, a Congress intent on encouraging the vindication of denials of civil rights would certainly desire that citizens be able to secure those rights as against the government, as 'private attorneys general' are especially needed where the public attorney general will not act. Moreover, the government, with its deep pocket and batteries of lawyers, is the kind of opponent few individuals could fight effectively without fee shifting. Finally, the government cannot serve as a model

* The fundamental issue herein, as raised for review, is whether under the Civil Rights Attorneys' Fees Awards Act (42 U.S.C. Section 1988), a prevailing private civil rights litigant can secure fees against federal officials.

to its citizens if it can so easily escape enforcement of the civil rights laws." *Id.*

The Respondents assert that "nothing has occurred since this Court's denial of review in *Shannon* that would make the issue [raised herein] worthy of review." See: Brief in Opposition at page 3.

In view of the obvious concern expressed by scholars and commentators about the over-riding public interest issue raised herein and in light of the deterring effect of the adverse decision of the majority of the panel below and of the Third Circuit in *Shannon* with respect to effective enforcement of civil rights statutes against the federal government (and the conflicting view recently expressed by the Seventh Circuit, albeit somewhat confusing and now vacated on other grounds), there is every reason for this Court to now address the issue. Accordingly, it is incumbent upon this Court to accept review and resolve this important controversy once and for all.

3. It is submitted that without the private attorneys' general efforts in the instant case, the public attorney general would not have had the impetus to issue the memorandum which effectively undercut the previously enunciated federal policy of non-dual prosecution (where state and/or local efforts have been undertaken with respect to alleged criminal wrongdoing on the part of local law enforcement agents); and the federal criminal/civil rights efforts being undertaken (and continuing) in the State of Florida, as a consequence of the recent civil unrest, would not, in all likelihood, have transpired. Thus, notwithstanding the Respondents view that this matter should be remanded to the Court below on the issue of "prevailing party status", should this Court find for the Petitioners on the fundamental issue raised herein, the Petitioners believe that their "pre-

vailing party status" is testified to by the efforts of the federal Defendants in the State of Florida, at this time; and that the prevailing party status is of inconsequential matter herein. If anything, the efforts in Florida manifest the need to allow fees from the federal government to prevailing private civil rights litigants in order to effect more positive action and policies from the federal government in the area of civil rights and civil liberties (as were secured by the Petitioners from and through the instant litigation).

CONCLUSION

For the foregoing reasons (in addition to those otherwise previously expressed and discussed) the Petition herein should be granted.

Respectfully submitted,

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THOMAS I. ATKINS
CHARLES E. CARTER
JAMES I. MEYERSON
1790 Broadway-10th Floor
New York, New York 10019
(212) 245-2100

J. FRANCIS POHLHAUS
733 15th Street, N.W.
Suite #410
Washington, D.C. 20005
(202) 638-2269

Attorneys for Petitioners

BY: .....

June 9, 1980

Certificate of Service

James I. Meyerson, one of the attorneys for the Petitioners, certifies that on the 11th of June, 1980, I did serve three copies of the foregoing Petitioners' Reply to Respondents' Brief in Opposition upon the attorneys for the Respondents by mailing the same, postage prepaid, first class, as follows: Drew Days, Esq., Assistant Attorney General, Walter W. Barnett, Esq., Cynthia L. Attwood Esq., Attorneys, Department of Justice, Washington, D.C. 20530, and the Honorable Wade McCree, Jr., Solicitor General, Justice Department, Washington, D.C. 20530.

Respectfully submitted,

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JAMES I. MEYERSON
1790 Broadway-10th Floor
New York, New York 10019
(212) 245-2100

Attorney for Petitioners

BY: .....

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 15, 1980

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

Nos. 77-1698, *et al.*

IBERIA HAMPTON, *et al.*,

Plaintiffs-Appellants,

vs.

EDWARD HANRAHAN, *et al.*,

Defendants-Appellees.

On Petitions for Rehearing.

ORDER

On consideration of the motions filed by the state and federal defendants, respectively, for rehearing and suggestions for rehearing *en banc* of the order with respect to the award of attorneys fees issued on December 12, 1979,

IT IS ORDERED that the penultimate paragraph on page 13 of that order be amended to read as follows:

> Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the federal defendants and two-thirds should be paid by the state defendants.

The remaining portion of that paragraph is deleted.

IT IS FURTHER ORDERED that the state defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* concerning attorney fees is hereby DENIED.

IT IS FURTHER ORDERED that the federal defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* is hereby DENIED.

IT IS FURTHER ORDERED that the motion filed by the United States to intervene is hereby DENIED.

PELL, *Circuit Judge*, concurring.

Pursuant to 42 U.S.C. § 1988, and citing as case authority *Davis* v. *Murphy*, 487 F.2d 362 (7th Cir. 1978), the majority opinion in this case granted the request of the appellants for attorneys' fees for their appellate work. 600 F.2d at 643. In my dissenting opinion, I implicitly agreed that the appellants were entitled to fees for their appellate work but would have only allowed the fees commensurate with the work involving the shooter defendants. 600 F.2d at 666. My treatment of the matter of fees came at the end of a lengthy dissent and was included in a catchall section dealing with "Other contentions and issues." I now am of the belief that my position was incorrect and that the appellants are not "prevailing" parties within the meaning of section 1988. It is true that they have prevailed thus far in the sense of keeping the litigation alive, but that is the

only sense in which they are prevailing. They yet have to establish by a final judgment the merits issue of their claim that their civil rights have been violated.

Because the position I have now reached after considerable reflection is a reversal of the position I have heretofore taken on the particular issue, I deem it necessary to review briefly some of the record matters in this complex litigation.

The only references I am able to find in the original briefs filed by the appellants are two in the brief of the Anderson plaintiffs. One of these is the last in a listing of the issues presented for review and reads in its entirety as follows:

> XIII. The plaintiffs should be awarded costs and attorneys' fees for the trial and for this appeal.

The second reference in the original brief appears at page 181 of the brief, a section devoted to the federal defendants, and reads as follows:

> And finally, cost for the trial and the appeal, and attorneys' fees* should be assessed against these Defendants.
>
> * *Donahue* v. *Staunton,* 471 F.2d 475 (7th Cir. 1972); *Stolberg* v. *Members of Board of Trustees,* 474 F.2d 485 (1st Cir. 1973); Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, effective October 19, 1976.

These fleeting references in a 247 page brief scarcely placed in focus the matter of fees as a serious issue and I am unable to find that it was even addressed in the briefs of the defendants. The issue, however, was addressed at some greater length in the reply brief of the Anderson plaintiffs to which the defendants, of course, did not have a

further opportunity of briefing a response. In their reply brief these plaintiffs while conceding that they "may not technically be 'prevailing parties'," contended that an award of attorneys' fees would be consistent with the policy, spirit, and congressional intent underlying section 1988. In addition, the appellants cited a number of cases as reflecting a growing body of precedent supporting the interim award of attorneys' fees.

The propriety of granting fees for appellate work in a situation such as the present where the claiming party had not yet prevailed on the merits was put in sharp focus by the federal defendants' petition for rehearing and suggestion for rehearing in banc in which this was one of only two issues raised. Specifically, these defendants contended that the cases on which the majority had relied were cases which disposed of the merits and that the principal case actually treating the issue, which was in the D.C. Circuit, had reached a contrary result. I agree with Judge Bazelon's analysis.

By an evenly divided vote, this court denied rehearing in banc which, as I see it, settled the issue insofar as this court was concerned, as the issue was squarely presented in the petition for rehearing. The petitions for rehearing presently pending before this court are in essence asking for reconsideration of an issue which has already been the subject of disposition. I do not read these petitions as essentially challenging the amount of the attorneys' fees but rather the propriety of any fees at all.

I am not unmindful that I joined in the order of this court of December 12, 1979, in which it was indicated that the court deemed that the plaintiffs had shown substantial success on the merits on appeal and that they were prevailing parties under section 1988. Upon further research and reflection, I am convinced that I was legally incorrect in

thinking that there was a basis for the award of any fees at this time.

Notwithstanding this "confession of error" on my part, I cannot be unmindful that procedurally this court by denying in banc rehearing has rejected the position which I now believe to be correct and I have no reason for believing that the three judges who voted against the rehearing in banc did not give full consideration to the propriety issue which was set forth in the petition for rehearing and is now being readvanced. The issue is one which has been raised by the defendants in their petitions for certiorari before the Supreme Court. I reluctantly conclude that it is the Supreme Court to which the defendants must look for relief from the order for the payment of the attorneys' fees in question.

I therefore concur in the foregoing order, albeit reluctantly.